tion specified in section 300 as constituting the offence of murder. In fact at page 37 of his summing-up, the learned Judge would appear to have appreciated the defence's position although he did not elaborate on it as much as he did on the defence of provocation. The crux of the defence "of intention to frighten and not to kill" was merely put to the jury in the following manner:

"The main thrust of the defence of the accused is that at the time of the shooting he had never intended to kill or even to wound the deceased. He merely wanted to frighten the deceased. He was at that time very angry and could not control himself. In fact he was in a confused state."

In jury trial, the first duty of the Judge in dealing with the defence case is to put to the jury the defence put up by the accused even if such defence appears to him to be too far-fetched and ought to be rejected. Such defence may constitute a lesser offence than murder, or it may even be lesser than culpable homicide not amounting to murder. The trial Judge is of course at liberty to comment on the evidence and in rare and appropriate cases may even make unfavourable remarks on the defence put up by the accused provided he makes it very clear to the jury that they are not bound by his view and opinion on issues of fact. His next duty is to put to the jury all available defences whether or not relied upon by the accused, having regard to the evidence. But as was held by the Court of Appeal in *Loo Geok Hong* v. *Public Prosecutor*,[1] the way in which the jury is to be directed on available defences is a matter for the trial Judge having regard to the evidence with which he is concerned. What is important is the effect and not the form of the direction.

Having regard to the evidence, we were of the view that it was inadequate for the learned Judge merely to refer to the jury to the defence story of his intention "merely to frighten the deceased" as only relevant to negative the intention to kill, but he should have gone one step further by leaving it to the jury to consider a possible third verdict of guilty under section 304A of the Penal Code for firing the M.16 rifle in a rash or negligent manner even if they were to conclude that the shooting was "merely to frighten the deceased." Although the learned Judge did briefly refer to such defence, it was his duty in this particular case to put it to the jury as a third alternative verdict, and it was for the jury to accept or reject the defence. The failure to do so was fatal in the circumstances. In this particular instance, the importance of putting the defence story for two distinct purposes assumed particular importance in view of the thorough manner in which the learned trial Judge had dealt with the defence of provocation. So much so, it was more than likely that any reasonable jury would have thought that the defence put up by the appellant was merely the defence of provocation and not also one of shooting in the direction of a moving motor-cycle on which the deceased was a pillion rider, for the purpose of frightening him. It was unfortunate that in this particular case the thoroughness of the trial Judge's direction to the jury on the alternative verdict of culpable homicide not amounting to murder on ground of provocation, which in itself was not wrong in law, had the effect of obliterating or diluting the brief direction on the defence of "merely to frighten the deceased." The two alternative verdicts had the effect of restricting the jury to consider the defence's story only as regard intention to kill but not as a possible defence of reducing the offence to one under section 304A. In the light of the evidence before him, the learned Judge should, having recognised the main thrust of the defence, put to the jury the verdict they should return not only in the event that they rejected the defence's story "to frighten the deceased," but also in the event of them accepting such defence. If only the third alternative verdict under section 304A had been put to the jury, the summing-up of the learned Judge would have been beyond criticism.

For reasons we have stated, we quashed the conviction and ordered a retrial.

Conviction quashed and retrial ordered

Solicitor: *G.N. Christie & Co.*

SUN PROPERTIES SDN. BHD. & ORS. v. HAPPY SHOPPING PLAZA SDN. BHD.

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ.) April 1 & June 8, 1987]

[Kuala Lumpur – Supreme Court Civil Appeal No. 141 of 1986]

Contract – Sale of shares in company – Payment of deposit – Forfeiture of deposit – Contracts Act, 1950, s. 75.

The respondent entered into a sale agreement with the appellants to purchase from the appellants all the shares in a company for the price of $10 million. The sum of $1 million was paid as deposit and towards account of the purchase

price and it was provided that if the purchaser failed to pay any of the instalments under the sale agreement the vendors shall be entitled to "forfeit all sums thencetofore paid by the purchaser". Time was declared to be of the essence of the contract. The respondent failed to pay the first instalment of $4 million on the due date in accordance with the agreement and the appellants thereupon repudiated the agreement and forfeited the said $1 million paid as deposit and towards the purchase price. The respondent applied for a declaration that the forfeiture clause of the sale agreement was invalid and unenforceable being in breach and violation of section 75 of the Contracts Act, 1950, and also sought a declaration that the forfeiture of the said $1 million is illegal, null and void. The learned judge granted the declarations (see [1987] 1 M.L.J. 319) and the appellant appealed.

Held, allowing the appeal: on a proper reading of the sale agreement the $1 million forfeited in this case is a true deposit and was lawfully and properly forfeited by the appellants.

Cases referred to:

(1) *Linggi Plantations Ltd.* v. *Jagatheesan* [1972] 1 M.L.J. 89.
(2) *Howe* v. *Smith* (1884) 27 Ch. D. 89, 101.
(3) *Soper* v. *Arnold* (1889) 14 App. Cas. 429.
(4) *Fateh Chand* v. *Balkishan Dass* A.I.R. 1963 S.C. 1405, 1411.

SUPREME COURT.

Cecil Abraham (*Y.M. Siew* with him) for the appellants.

C.V. Das (*K.S. Cheong* with him) for the respondent.

Cur Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): On May 11, 1981, the respondent entered into a sale agreement with the appellants to purchase from the appellants all the shares held in one Loke Kee Development Sdn. Bhd. for consideration of $1,000,000.00. Because the interpretation of certain clauses in the sale agreement will be crucial in arriving at a decision in the appeal the relevant clauses are reproduced below:

"1. In consideration of the sum of Malaysian Ringgit One Million ($1,000,000.00) only now or heretofore paid to the Vendors by the Purchaser *as deposit and towards account of the purchase price* (the receipt whereof the Vendors hereby expressly acknowledge) the Vendors hereby sell and the Purchaser hereby purchase the said shares free from encumbrances at the total purchase price of Malaysian Ringgit Ten Million ($10,000,000.00) only.

2. The balance of the purchase price amounting to Malaysian Ringgit Nine Million ($9,000,000.00) only shall be paid by the Purchaser to the Vendors Solicitors Messrs Soo Thien Ming & Shahrizat, Advocates and Solicitors of Wisma Tek Lee, 2nd Floor, Jalan Tun Razak, Kuala Lumpur (hereinafter called "the Vendors' Solicitors") in the manner hereunder set out:—

(i) On or before 3.10.81	..	$4,000,000.00
(ii) On or before 3.12.81	..	$5,000,000.00
...	...	...

4. It is hereby expressly agreed between the parties hereto that if the Purchaser fails to pay any of the instalments within the stipulated time as mentioned under Clause 2 hereof, *the Vendors shall be entitled to forfeit all sums thencetofore paid by the Purchaser* to the Vendors and whereupon this Agreement shall terminate and [be] of no further effect and neither party shall have any claim against the other.

... ...

15. Time whenever mentioned in this Agreement shall be the *essence* of the contract."

(emphasis provided)

The respondent failed to pay the first instalment for $4,000,000.00 in accordance with clause 2(i) on the due date and the appellants thereupon repudiated the agreement and forfeited the said $1,000,000.00 paid as deposit and towards account of the purchase price under clause 1.

The respondent by Originating Summons sought from the High Court a declaration that clause 4 of the sale agreement is invalid and unenforceable being in breach and violation of section 75 of the Contracts Act 1950 and also sought for a consequent declaration that the forfeiture of the said $1,000,000.00 is illegal, null and void. The learned judge granted the declarations.

Section 75 of the Contracts Act reads:

"75. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

The learned judge was of the view that clause 4 of the sale agreement provided for the forfeiture of not only one definite sum but actually two different sums depending on when the respondent failed to perform. He was also of the view that the $1,000,000.00 as stipulated in clause 1 does not represent a "deposit simpliciter" but forms part

and parcel of a larger sum of $5,000.000.00. He concluded that this is a kind of situation where section 75 of the Contracts Act should be applied and directed that a reasonable compensation be assessed at a later date.

The crux of the matter here is whether the $1,000,000.00 is a true deposit. If it is a true deposit or earnest money (the two terms being interchangeable) then the sum is irrecoverable by the respondent and it can lawfully be forfeited by the appellants. The fact that the amount is $1,000,000.00 does not alter the position since 10% of the purchase price is normally a standard amount put as deposit and as Lord Hailsham L.C. said in *Linggi Plantations Ltd.* v. *Jagatheesan*[1]:

"There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land."

The expression used in clause 1 of the sale agreement in the instant case is a standard expression used in all sale agreements where money is paid as a deposit and part payment of the purchase price. The expression "as a deposit and part payment of the purchase money" always relates to the two alternatives that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment. A deposit is not merely a part payment but is also an "earnest" money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract – see *Howe* v. *Smith.*[2] The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business – per Lord MacNaghten in *Soper* v. *Arnold.*[3]

On a plain reading of clause 1 of the sale agreement in this case there is no doubt that the $1,000,000.00 is a true deposit and the appellants are entitled to forfeit the sum when the respondent failed to comply with clause 2 of the agreement. The description "all sums thencetofore paid by the purchaser to the vendors" must certainly include the $1,000,000.00 paid in clause 1.

In his judgment the learned judge accepted that the $1,000,000.00 is 10% of the purchase price and is an acceptable amount as deposit. But he concluded that in this case it is not a deposit simpliciter but forms part of a much larger sum namely $5,000,000.00. On a proper reading of clauses 1 and 2 of the agreement we are unable to support this conclusion. What apparently worried the learned judge was that part of clause 4 of the agreement which purports to entitle the appellants to forfeit all sums thencetofore paid by the purchaser if the purchaser failed to pay the final instalment under clause 2(ii) of the agreement which would make it according to him a stipulation by way of penalty within the meaning of section 75 of the Contracts Act.

It is to be observed firstly that this is not the situation here. The default by the respondent in the present case is in the very first instalment under clause 2(i) of the agreement and the sum thencetofore paid was $1,000,000.00 which is 10% of the purchase price and nothing more. Secondly as can be observed in *Linggi Plantations* Lord Hailsham when referring to *Fateh Chand* v. *Balkishan Dass*[4] drew the distinction between the sum of Rs. 1,000/- expressly named and paid as earnest money and a further sum of Rs. 24,000/- which the court held was not in the nature of earnest money and therefore subject to the provision of section 74 of the Indian Contract Act. Finally, as observed by the court in *Fateh Chand* section 74 of the Indian Contract Act (*in pari materia* with section 75 of our Contracts Act) deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains a stipulation by way of penalty. Shah J. added however that:

"We are in the present case not concerned to decide whether a contract containing a covenant of forfeiture of deposit for due performance of a contract falls within the first class."

In that case the contract provided for forfeiture of Rs. 25,000/- consisting of Rs. 1,000/- paid as earnest money and Rs. 24,000/- paid as part of the purchase price. The defendant has conceded that the plaintiff was entitled to forfeit the amount of Rs. 1,000/- which was paid as earnest money.

We are of the view that on a proper reading of clauses 1 and 4 of the sale agreement the $1,000,000.00 forfeited in this case is a true deposit and was lawfully and properly forfeited by the appellants. The appeal is accordingly allowed with costs here and below.

Appeal allowed.

Solicitors: *Soo Thien Ming & Shahrizat; Shook Lin & Bok.*